Supreme Court, U.S.
FILED
DEC 1 _ 2003
OFFICE OF THE CLERK

No. 03-641

In The Supreme Court of the United States

REGAL CINEMAS, INC. and
EASTGATE THEATER, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH,
and KATHY BRADDY,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF AMC ENTERTAINMENT, INC. AND LOEW'S CINEPLEX ENTERTAINMENT CORPORATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF *AMICI* AND PRELIMINARY STATEMENT[1]

Amici are owners and operators of "stadium-style" movie theaters. This innovation in theater design caught on in 1995 and, since then, *amici* have invested hundreds of millions of dollars building literally thousands of individual theaters employing this design.[2]

Like petitioner Regal Cinemas, *amici* are subject to and sought to comply with Section 4.33.3 of the ADA Accessibility Guidelines ("ADAAG"), 28 C.F.R. pt. 36, app. A, at 668-69 (2003), which requires that people with physical disabilities be provided wheelchair seating that is "an integral part" of the fixed seating plan with "lines of sight comparable to those for members of the general public." Section 4.33.3 also mandates, among other requirements, that the wheelchair seating "adjoin" an accessible exit route and that a companion fixed seat be provided next to each wheelchair seating area.

It is undisputed that neither the drafters of Section 4.33.3 nor the Department of Justice ("DOJ") officials who promulgated the regulation considered the application of this regulation to stadium-style movie theaters. It is also undisputed that although Title III of the ADA requires

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[1] The parties have consented to the filing of this *amicus* brief. Pursuant to Rule 37.6 of the Supreme Court Rules, *amici* state that counsel for *amici* practice in the same law firm as counsel for Petitioners. *Amici* further state that, other than *amici* and their counsel, no person or entity made a contribution to the preparation of this brief.

[2] *Amicus* AMC Entertainment has constructed or acquired 113 stadium-style theater complexes in the United States, containing 2,125 movie screens. *Amicus* Loew's Cineplex Entertainment Corporation operates 44 stadium-style theaters in the United States, containing 728 movie screens.

DOJ to promulgate regulations and publish technical assistance manuals precisely so that builders will have detailed, authoritative notice of ADA requirements when designing structures subject to the Act's requirements for new construction, DOJ failed to provide any guidance suggesting the interpretation of Section 4.33.3 that it now seeks to impose retroactively on theater builders and owners.

Quite the opposite in fact. As late as March 1997, DOJ held a formal presentation for theater owners on the requirements of Section 4.33.3 and explicitly refused to take *any* position as to what the regulation requires with respect to the placement of wheelchair seating in the increasingly prevalent stadium-style theaters. *See United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1105 n.15 (C.D. Cal. 2002). DOJ's refusal to provide relevant pre-construction guidance on the meaning of Section 4.33.3 stands in sharp contrast to its willingness in other contexts to provide meticulously detailed guidance – specifying standards for matters such as the maximum thickness of carpet pile – upon which builders have been able to rely to meet ADA requirements. *See* ADA Accessibility Guidelines, Section 4.5.3, 28 C.F.R. pt. 36, app. A, at 605.

Faced with this lack of guidance from DOJ, *amici* sought to comply with the amorphous requirement that they provide "lines of sight comparable to those for members of the general public" by placing wheelchair seating at their stadium-style theaters solidly within the footprint of the theater seating plan in locations that assured an unobstructed view of the screen. *Amici* placed the wheelchair seats (for theaters with a capacity of under 300

persons)[3] generally in the front third of the auditorium. In most stadium-style theaters, this portion of the auditorium is built on a sloped floor or on modest risers, rather than on the steep risers used farther back because it is only towards the rear of the auditorium that the steeper slope is needed to provide lines of sight over forward sitting patrons. Although DOJ was fully aware of the boom in stadium-style theater construction, it expressly declined to take a position on the application of Section 4.33.3. Instead, it stood by silently while *amici* invested heavily in the building boom for stadium-style theaters, raising no challenge to *amici*'s reasonably held belief that their approach to wheelchair placement comported with the ADA.

DOJ's approach to Section 4.33.3 took an abrupt turn in 1998 when it filed an *amicus curiae* brief in support of a private litigant's challenge to the placement of wheelchair seating in stadium-style theaters. *See* Brief of *Amicus Curiae* United States on Summary Judgment Issues 4, 8-9, *Lara v. Cinemark, USA, Inc.*, No. EP-97-CA-502-H, 1998 WL 1048497 (W.D. Tex. Aug. 21, 1998). In that *amicus* brief, DOJ announced, for the first time, that, to comply with Section 4.33.3, theater owners had to place wheelchair seating in the stadium portion of each auditorium and, moreover, that the wheelchair seats must provide specific and (in the Department's subjective view) advantageous "viewing angles" to the screen.

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[3] Section 4.33.3 requires that, in auditoriums containing more than 300 seats, wheelchair seating be offered in more than one location. 28 C.F.R. pt. 36, app. A at 668.

Having generated out of the blue in its *Lara amicus* brief a completely new approach to line of sight comparability under Section 4.33.3,[4] DOJ initiated a series of lawsuits against *amici* and others charging violations of several variants of its newly minted "viewing angle" requirement and seeking not just prospective remedies governing future construction, but also retrospective injunctive relief requiring the reconstruction of existing theaters.[5] Although more than five years have passed since DOJ announced its position on line of sight comparability, it has yet to amend Section 4.33.3 through formal notice and comment requirements. Nor has DOJ issued technical assistance on this point. Instead, it has charted a post hoc regulatory course entirely through litigation.

REASONS FOR GRANTING THE WRIT

The Justice Department's lawsuits, as well as its *amicus* pleadings in private actions, have resulted in judicial chaos with respect to two issues of broad significance: (1) what does Section 4.33.3 require with respect to the placement of wheelchair seating; and (2) should courts

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[4] The novelty of DOJ's approach is powerfully confirmed by the fact that, in 1999, the Architectural and Transportation Barriers Compliance Board (which provides guidelines for ADA compliance and which drafted the language that DOJ promulgated as Section 4.33.3) published a Notice of Proposed Rulemaking inviting comment on whether Section 4.33.3 should be amended to include the "viewing angle" requirement that DOJ was advocating in litigation. *See* 64 Fed. Reg. 62,248, 62,278 (Nov. 16, 1999).

[5] *See United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73 (D. Mass. 2003), *appeals pending*, Nos. 03-1787, 03-1808 (1st Cir.); *AMC Entertainment*, 232 F. Supp. 2d 1092; *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705, 11 (N.D. Ohio Nov. 19, 2001), *rev'd and remanded*, No. 02-3100, 2003 WL 22508500 (6th Cir. Nov. 6, 2003).

defer to an agency's post hoc elaboration of a vague regulatory standard, announced by *amicus* brief, where enforcement of the newly announced requirements would frustrate Congress' manifest intention to prevent the economic waste and disincentives to investment associated with such retrospective standard setting?

We urge this Court to clarify the law on these important points. The Ninth Circuit's decision in *Stewmon* adopts an incorrect, unworkable, and potentially ruinous approach to Section 4.33.3 that is in direct conflict with the approach taken by other courts and should be overturned. More broadly, the Ninth Circuit's reflexive and conclusive deference to a post hoc reinterpretation of an agency regulation, set forth in an *amicus* brief, misreads fundamental administrative law precedents of this Court and subverts Congress' effort to establish a fair and workable regulatory regime for new construction standards under the ADA. If allowed to stand unchecked, the Ninth Circuit decision opens the door to abuse of regulatory authority at the expense not only of movie theater businesses and others who have constructed new facilities in reliance upon the ADA's ostensible protections against retroactive standard setting, but also of regulated entities in other industries that make long-term decisions in reliance upon legislative protections against post hoc changes in regulatory standards.

I. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 4.33.3 LIES ON ONE SIDE OF A SPLIT AMONG THE CIRCUITS THAT THIS COURT SHOULD RESOLVE

Judicial interpretation and application of Section 4.33.3 is a picture of inconsistency and uncertainty. The Fifth Circuit has interpreted the regulation's line-of-sight

comparability standard to require an unobstructed line of sight from seat to screen from a location "amidst general public seating." That court, moreover, specifically rejected the "viewing angle" gloss that DOJ sought to place on the language of the regulation. *See Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788-89 (5th Cir. 2000). A federal district court in New York reached a similar conclusion. *See Meineker v. Hoyts Cinemas Corp.*, 216 F. Supp. 2d 14, 18 (N.D.N.Y. 2002) (finding that Section 4.33.3 imposes a "viewing angle" requirement, but adopting a modified version of the *Lara* court's ruling that unobstructed views from positions within seating for the general public satisfy Section 4.33.3), *vacated and remanded*, 69 Fed. Appx. 19 2003 WL 21510423 (2d Cir. 2003) (directing district court to consider whether DOJ interpretation should be given deference and whether defendant had preconstruction notice).

The Sixth Circuit, however, in a decision handed down since Regal Cinemas filed its Petition for Certiorari, has opined that the requirement of Section 4.33.3 cannot be limited (as the Fifth Circuit has held) to providing an "unobstructed view." *United States v. Cinemark USA, Inc.*, No. 02-3100, 2003 WL 22508500 at **6-9 (6th Cir. Nov. 6, 2003). Yet the Sixth Circuit provided no substitute definition, instead remanding to the district court for an initial decision. Meanwhile, a district court in Massachusetts has accepted DOJ's claim that Section 4.33.3 imposes a "viewing angle" requirement, but has also concluded that DOJ, having provided no pre-construction notice to the theater builder, cannot impose that requirement retroactively without violating due process. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73 (D. Mass. 2003). The First Circuit now has this case on appeal.

The Ninth Circuit's decision in *Stewmon* sits at the outer edge of this mass of confusion. The opinion of the

panel majority decrees that wheelchair seating must be placed so that it has a viewing angle "within the range of angles offered to the general public in the stadium-style seats." 339 F.3d at 1133. As Judge Kleinfeld's dissent rightly points out, this requirement, aside from having no grounding in the regulation's language, has no clear meaning and, thus, leaves theater owners in legal limbo. Ironically, petitioner Regal Cinemas, like the *amici*, places wheelchair seats inside the floor plan for general seating. The wheelchair seats therefore already provide a viewing angle within the range offered "members of the general public." Yet the Ninth Circuit panel majority found this to be inadequate, and entered summary judgment for the plaintiffs on a theory that the regulatory requirement of comparable lines of sight mandates some sort of comparative test – the terms of which the majority fails to specify – between viewing angles from wheelchair seats and viewing angles from a subset of the non-wheelchair seats.

To the extent that the Ninth Circuit decision may be read as endorsing the government's position – that "lines of sight comparable" means a viewing angle "better than 50 percent of the seats" – that standard too finds no grounding in the regulation and is, in any event, completely subjective. After all, why should a "comparable" line of sight mean a viewing angle "better" than the angle from half the seats – and what does "better" mean anyway, where preference is subjective and can vary from person to person for a multitude of reasons?

In the debate between the Ninth Circuit majority and the Fifth Circuit joined by Judge Kleinfeld in his *Stewmon* dissent, it is evident which side offers the more logical and reasonable interpretation of Section 4.33.3. A regulation that allows wheelchair seating to be grouped in a single location, while requiring that the seating be "integral" to a seating plan and offer "lines of sight comparable" to those

available to the general public, is best read as mandating unobstructed views from a location within the general seating plan. In this way, theater builders are prohibited, as the ADA intended, from ghettoizing wheelchair patrons in special sections or in seats where the screen is obscured. But for present purposes, it is most urgent simply to note that the movie theater industry finds itself in a state of total uncertainty about the legality of much of its basic infrastructure and, in the Ninth Circuit, now operates under a rule that makes no sense and that portends financial consequences of unknown but potentially enormous proportions.

II. THE NINTH CIRCUIT'S DECISION REFLECTS A FUNDAMENTAL MISUNDERSTANDING, ALSO EVIDENT IN RECENT DECISIONS OF OTHER LOWER COURTS, OF THE SOURCES OF, AND LIMITS ON, JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS OF THEIR OWN REGULATIONS

The Ninth Circuit's decision in *Stewmon* rests on the mechanistic application of a peculiarly stunted conception of the doctrine of judicial deference to agency regulatory interpretations that this Court first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1941). *See* 339 F.3d at 1131 & n.6 (citing recent decisions applying *Seminole Rock* deference). This Court's precedents make plain that *Seminole Rock* deference operates only as a qualified presumption of congressional intent as to the scope of agency policymaking authority. In ignoring this fundamental limitation on the *Seminole Rock* doctrine and blindly deferring to DOJ's campaign to make regulatory changes through *amicus* briefs, the Ninth Circuit subverted

Congress' intent to circumscribe agency policymaking under Title III of the ADA.[6]

Seminole Rock deference to agency interpretations of regulations that Congress has authorized agencies to promulgate – like *Chevron*[7] deference to agency interpretations of statutes that Congress has authorized agencies to administer – is based on congressional intent. In the *Seminole Rock* context, courts apply a presumption of implied legislative intent: the authority to promulgate regulations, absent convincing evidence that Congress intended otherwise, is presumed to carry with it the authority to resolve ambiguities in those regulations. "Because applying an agency's regulations to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [the courts] presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 568 (1980) (respect traditionally shown to agency regulatory interpretations is "particularly apt" where regulations

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[6] The Ninth Circuit specifically rejected petitioners' objections to the manner in which DOJ sought to add new content to Section 4.33.3, citing *Auer v. Robbins*, 519 U.S. 452 (1997), as support for its conclusion that DOJ did not forfeit its claim to deference by announcing its new interpretation of Section 4.33.3 in an *amicus* brief, rather than through a more formal process designed to ensure adequate consideration of the views of potentially affected parties. *See Stewmon*, 339 F.3d at 1131 n.6. The reasons why *Auer* cannot sustain DOJ's retroactive imposition of new substantive obligations without notice-and-comment are set forth in the Petition for Certiorari filed by Regal Cinemas and Eastgate Theater. *Amici* concur in that analysis.

[7] *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984).

were promulgated under statute giving "broad administrative lawmaking power to the agency"); *compare Chevron*, 467 U.S. at 843-44 (where Congress has delegated "authority to the agency to elucidate a specific provision of [a] statute by regulation," whether explicitly or implicitly, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

As is evident in a number of this Court's recent administrative law precedents, however, the *Seminole Rock* presumption of an agency's authority to interpret its own regulations is only a qualified presumption. This Court has emphasized, for example, that *Seminole Rock* deference does not function as a license for arbitrary lawmaking. Even where applicable statutes impose no particular limitations on agency power to establish standards through informal interpretation, courts do not presume that Congress intended for courts to defer to agency interpretations that do not articulate a "reasoned and consistent view," or that contradict views "advocated in past cases." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *accord Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) ("An agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view.") (internal quotation marks omitted). Deference has also been denied where an alternative to the agency's preferred "reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Id.* at 512; *see also Auer*, 519 U.S. at 462 (contrasting "fair and considered judgment[s]," which are owed deference, with "post hoc rationalization[s]," which are not) (internal quotation marks omitted).

This Court has also ruled that *Seminole Rock*'s presumption of agency authority to interpret agency

regulations does not extend to "interpretations" that would upend an established statutory scheme. In *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994), this Court declined to defer to the "true doubt rule," under which the Department of Labor shifted the burden of persuasion to the party opposing certain benefits claims. The government argued that the true doubt rule, as applied to cases arising under the Black Lung Benefits Act, must be accepted as a permissible agency interpretation of a regulation providing that black lung "claimants be given the benefit of all reasonable doubt as to the existence of . . . disability or death due to pneumoconiosis." *Id.* at 271 (quoting 20 C.F.R. § 718.3(c) (1993)). The Court found that this true doubt rule conflicted with section 7(c) of the Administrative Procedure Act. Even assuming that the black lung statute empowered Labor "to displace section 7(c) through regulation," the Court found that Labor's "ambiguous regulation" was insufficient to "overcome the presumption that these adjudications under the BLBA are subject to § 7(c)'s burden of proof provision." *Id.* In short, the presumption that Congress invested the agency with the power to interpret its own regulation did not extend to an "interpretation" of an ambiguous regulation that would effectively exempt agency proceedings from a fundamental background rule of administrative adjudication.

The Ninth Circuit's decision in *Stewmon* fails to apprehend that *Seminole Rock* operates as a qualified, rather than absolute presumption of agency authority to engage in regulatory interpretation. In according *Seminole Rock* deference to DOJ's various interpretations of Section 4.33.3, the Ninth Circuit, like the other courts that have imposed ADA liability on stadium-style theater owners, elided a critical threshold inquiry: whether the statute under which the agency promulgates and administers the

regulatory requirements in question limits the agency's power to establish new substantive rules through informal interpretation. In particular, these courts have failed to recognize that Title III of the ADA cannot reasonably be construed to authorize DOJ "interpretations" of new construction regulations that impose new substantive obligations not communicated by the terms of the regulations or the statutorily mandated technical guidance.

In establishing the Title III requirements for privately operated public accommodations and commercial facilities, Congress drew a fundamental distinction between preexisting and newly constructed facilities. To avoid liability for discrimination against the disabled, owners of preexisting facilities were required to remove structural barriers only where "such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv); *see id.* § 12181(9) (whether an action is "readily achievable" depends upon factors including the "nature and cost of the action needed," and the effect of the action on the finances and operations of the targeted facility). New facilities, designed and constructed "for first occupancy later than 30 months after the date of enactment of this Act," are subject to more exacting requirements. Such facilities must conform to "standards set forth or incorporated by reference in regulations issued under this title," unless it is "structurally impractical" to meet these standards. *Id.* § 12183(a)(1); *see* 28 C.F.R. § 36.406(a).

In establishing this more exacting requirement for new construction, along with enforcement provisions allowing both private suits for injunctive relief and government actions for equitable relief and substantial civil penalties (*see id.* § 12188(a)-(b)), Congress was aware that retroactive application of new construction specifications would entail significant costs. Because it is far

more expensive to redesign and reconstruct facilities to meet these same standards in the first instance, retroactive specification of standards is both economically wasteful and unfair to the builders of new facilities. The standard setting process for newly constructed commercial facilities was designed to avoid such waste and unfairness.[8] Congress declined to authorize direct enforcement of

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[8] Congress' recognition of the importance of timely and authoritative standards for new construction is demonstrated by the history of Section 306(d) of the ADA, 42 U.S.C. § 12186(d), which specified default standards for new construction upon which builders of new facilities could rely in the event that DOJ failed to provide the authoritative regulatory guidance mandated by the Act. In testimony before the House Committee on the Judiciary, a representative of the American Institute of Architects argued that the creation of new construction standards could lead to "costly, often complicated redesign" if architects were forced to design buildings before they could "know with any certainty what they must do to comply" with the new construction standards. *See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 before the House Comm. on the Judiciary*, 101st Cong. 308 (testimony of Robert Lynch, American Institute of Architects). The architects urged Congress to eliminate costly redesigns by specifying interim, safe harbor standards for design work performed before promulgation of DOJ's standards. *See id.* at 314 (arguing that ADA should provide that compliance with existing requirements, established by national standards organization, would be "sufficient, though not necessary" to satisfy ADA requirements for new construction during transition period). The House Judiciary Committee reported a bill that provided the requested safe harbor through incorporation of existing bodies of specific accessibility standards. *See* H. Rep. No. 101-485(III) at 15, 18 (explaining that "particularized guidance and specifications regarding the meaning of the phrase 'readily accessible to and usable by [disabled persons]' " was immediately available from certain public and private standard-setting bodies, and that under the ADA, when fully implemented, "such specificity will be provided by the expanded Minimum Guidelines and Requirements for Accessible Design (MGRAD) standards to be issued by the Architectural and Transportation Barriers Compliance Board and by the regulations issued by the Attorney General").

a general statutory standard for accessibility of new construction, providing instead for the enforcement of regulatory standards devised to ensure accessibility. *See id.* §§ 12186(b)-(d), 12204. Statutory deadlines for the promulgation of regulations and the publication of technical assistance manuals were set to ensure that this guidance would be available in advance of the effective date of the new construction requirements. *See id.* §§ 12186(b)-(c), 12204(a).[9] In short, the structure of Title III and many of its critical terms demonstrate Congress' strong determination to ensure that parties contemplating construction of new facilities would have access to authoritative descriptions of their obligations before they constructed any facilities governed by the new construction standards.

The implications of Title III's emphasis on clear demarcation of new construction standards were recognized by the Court of Appeals for the District of Columbia Circuit in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (Silberman, J.). Plaintiffs in that case asserted that courts owed *Seminole Rock* deference to a DOJ interpretation of certain Technical Assistance Manual provisions, set forth in a DOJ *amicus* brief in a private enforcement action, pertaining to views from wheelchair seating areas in sports arenas over standing spectators. The D.C. Circuit noted that DOJ's

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[9] Section 506 of the ADA requires DOJ to develop and implement a plan to provide technical assistance to entities covered by the ADA, 42 U.S.C. §§ 12206(a), (c)(2)(C), and that to provide "appropriate technical assistance manuals to individuals and entities with rights or duties" under subchapter III, *id.* § 12206(c)(3). Covered entities cannot rely on the government's failure to supply technical guidance as a defense to ADA liability. *Id.* § 506(e). However, there is no suggestion that Congress intended to allow technical guidance to be used to impose new requirements on a retrospective basis.

effort to add new content to the provisions of the manual after the fact ran counter to Title III's emphasis on the establishment of authoritative prospective guidance, and expressed doubt that *Seminole Rock* deference could excuse this contradiction:

> Although there are circumstances in which a federal court may accept an agency's interpretation of a statute or regulation set forth only in an *amicus* brief, it is not clear here that the Department, which has the authority and duty to issue technical assistance manuals interpreting and applying its regulation, can further add to its interpretation in litigation – and get deference to that marginally additional interpretation.

Id. at 589 (internal citations omitted).[10]

Although *Paralyzed Veterans* ultimately relied on other reasons to reject DOJ's attempt to add to the requirements imposed by the regulations and technical assistance manual through "interpretation," its doubts concerning the availability of *Seminole Rock* deference

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[10] *Paralyzed Veterans* also addressed a challenge to DOJ's view, set forth in the Technical Assistance Manual, that the regulatory requirement of line of sight comparability refers not only to permanent obstructions but also to obstructions "caused temporarily by standing spectators." 117 F.3d at 583. The D.C. Circuit determined that the manual embodied a permissible interpretation of the regulation and, although the "issue [was] not easy," that DOJ had not changed its interpretation of Section 4.33.3 so as to forfeit *Seminole Rock* deference. *Id.* at 587. The Third Circuit has expressly rejected the D.C. Circuit's approach on this point. *See Caruso v. Blockbuster-Sony Music Entertainment Centre at Waterfront*, 193 F.3d 730, 736-37 (3rd Cir. 1999) (manual provisions respecting views over standing spectators did embody a change in DOJ's interpretation of section 4.33.3, which precluded DOJ from claiming *Seminole Rock* deference) (expressly disagreeing with *Paralyzed Veterans*).

were well founded. Where Congress goes to great lengths to provide clear guidance to regulated entities in order to reduce the risks of legal change through post hoc interpretation or clarification, as it did in the new construction provisions of the ADA, the ordinary presumption concerning the allocation of policy making authority that underlies *Seminole Rock* deference has no application. To assess the reasonableness of an agency's interpretation of its own regulation under these circumstances, a court must advance beyond a text-bound examination of ambiguity and ranges of permissible interpretations to consider whether the agency's post hoc "clarification" of its regulatory standards violates Congress' intent to protect against retroactive impositions of liability.[11]

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[11] Some courts of appeals have held that courts owe less deference to an agency's interpretation of its own regulation where that interpretation expands liability for past conduct than when the interpretation has exclusively prospective effects. *See, e.g., Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25 (1st Cir. 2000) (although OSHA interpretation was reasonable and valid, it could not be applied in a penalty case because regulation itself provided inadequate notice of the newly elaborated standard); *Trinity Broadcasting v. FCC,* 211 F.3d 618 (D.C. Cir. 2000) (plausible interpretation of FCC rule cannot serve as the basis for non-renewal of broadcast license where basis for this penalty was not "ascertainably certain" at the time of the alleged violation); *see generally* Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.11 (2003 & Supp. 2004) (arguing that "due process considerations" provide support for a two-tier approach to *Seminole Rock* under which agencies receive greater deference for interpretations that narrow eligibility for a benefit and for determinations that expand liability for penalties). In the context of this case, the fairness and due process concerns that arise when an agency interprets its regulations in a manner that leads to the imposition of penalties for past violations of a newly announced specification merely reinforce limitations on *Seminole Rock* deference that are compelled by Congress' clear intention that Title III of the ADA not produce such results.

The *Stewmon* majority, along with other decisions that have found ADA violations in stadium-style theaters based on DOJ's various interpretations of Section 4.33.3, improperly relied upon a narrow, text-bound analysis of *Seminole Rock* deference. Reviewing the text of Section 4.33.3 and DOJ's interpretative reformulation of that standard in isolation, the *Stewmon* majority asked only whether it was "unreasonable for DOJ to interpret 'comparable line of sight' to encompass factors in addition to physical obstructions, such as viewing angle." *Stewmon*, 339 F.3d at 1131. Upon finding that DOJ's interpretation of Section 4.33.3, as set forth in its *amicus* brief in the *Stewmon* appeal, "'sensibly conform[ed] to the purpose and wording of the regulations,'" the panel majority concluded that *Seminole Rock* deference was appropriate. *Stewmon*, 339 F.3d at 1131 (quoting *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 150-51 (1991)). Entirely missing from the panel majority's analysis was any consideration of Congress' unmistakable intention to establish a regulatory regime for new construction standards that would provide clear standards up front – a regime intended to avoid precisely the sort of economically wasteful post-construction trap that DOJ has sprung on entities that built stadium-style theaters in conformity with the regulations in place before DOJ set out the first variant of its post-1997 position in the *Lara amicus* brief.

The recent decisions of the Second and Sixth Circuits reflect similarly deficient conceptions of *Seminole Rock* deference. In *Meineker,* 69 Fed. Appx. 19, the Second Circuit did not actually decide whether *Seminole Rock* deference was available. Noting that the deference issue had been raised initially on appeal "when DOJ entered the case as an *amicus* for the first time," it vacated the trial court's summary judgment for the theater complex and

remanded for consideration of that issue.[12] However, in instructing the district court as to its task on remand, the Second Circuit framed the deference issue in virtually the same narrow terms as the panel majority in *Stewmon*, directing the court to consider whether "DOJ's interpretation of § 4.33.3 represents a 'fair and considered judgment' consistent with the history of the regulation" (*id.* at 25 (quoting *Auer*, 519 U.S. at 462)), as opposed to "a *post hoc* rationalization or 'convenient litigating position' entitled to little deference." *Id.* (quoting *Bowen*, 488 U.S. at 213). Similarly, in *United States v. Cinemark,* the Sixth Circuit concluded that DOJ's interpretation of Section 4.33.3 was entitled to deference based on a brief, wholly textual analysis, giving no consideration to the effect of such retroactive standard-setting on the system for establishing new construction standards that Congress sought to establish in Title III. *See* 2003 WL 22508500 at *7 ("DOJ's interpretation should be upheld unless it is 'plainly erroneous or

[12] The Second Circuit also instructed the district court to consider the extent of the defendant's pre-construction notice of the DOJ interpretation, presumably for purposes of determining the appropriate scope of any equitable relief. *See* 60 Fed. Appx. at 25-26; *see also United States v. Cinemark USA, Inc.,* 2003 WL 22508500 at *9 (theater builder's reasonable reliance on permit from DOJ approved permitting authority places due process limits on the extent of permissible injunctive relief). Although equitable limits on injunctive relief may alleviate the unfairness of a misguided deference to DOJ's interpretations of Section 4.33.3 in some circuits, the availability of this avenue of relief in the Ninth Circuit is open to question. *See Long v. Coast Resorts, Inc.,* 267 F.3d 918, 922 (9th Cir. 2001) (reversing magistrate ruling that equities did not favor injunction requiring expensive renovations to new construction to widen certain doorways from 28 to 32 inches in view of builder's substantial compliance and minimal inconvenience to wheelchair users).

inconsistent with regulation.'" (quoting *Auer*, 519 U.S. at 461)).[13]

The implausibility of the *Stewmon* majority's deference to DOJ's "interpretation" of Section 4.33.3 to impose new liability for pre-interpretation conduct is underscored by DOJ's lack of authority to accomplish the same result through formal rulemaking. In November 1999, the Access Board published proposed accessibility guidelines for public comment. *See* 64 Fed. Reg. 62,248. The proposed rule – which on the question of line-of-sight comparability states only that the Board is considering the adoption of specific requirements consistent with DOJ's interpretations of Section 4.33.3 (*id.* at 62,278) – stakes no claim that the Board and DOJ are empowered to establish new construction standards applicable to facilities designed for occupancy and use before the promulgation of those regulations in final form. Nor could such a claim be sustained, given the strong presumption against retroactive rulemaking authority and the lack of any such authority in the new construction provisions of the ADA. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) ("Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."). The Ninth Circuit in *Stewmon* nevertheless found that a new standard embodying the DOJ interpretation could be applied retroactively in this case, through "interpretation" of a prior regulation.

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[13] A district court in Massachusetts has applied *Seminole Rock* to DOJ's post-1997 "interpretations" of Section 4.33.3 in similar text-bound fashion. *See Hoyts Cinemas*, 256 F. Supp. 2d at 89-90 (DOJ's interpretation of Section 4.33.3 was not "'plainly erroneous or inconsistent with' the regulation," or contradicted by "'other indications of [DOJ's] intent ... at the time of the regulation's promulgation'" (quoting *Auer*, 519 U.S. at 461, and *Thomas Jefferson Univ.*, 512 U.S. at 512), *appeals pending*, Nos. 03-1787, 03-1808 (1st Cir.).

In sum, the Ninth Circuit in *Stewmon*, like the other courts that have deferred to the interpretations of Section 4.33.3 that DOJ began asserting in its *amicus* brief in *Lara v. Cinemark USA*, has improperly applied a narrow, text-bound understanding of *Seminole Rock* deference. This approach wholly ignores the critical threshold question presented not only in the stadium-theater cases, but also in other settings where Congress goes to unusual lengths to provide regulated entities with authoritative, reliable guidance upon which to base major economic decisions: whether an agency's presumed power to make policy through the interpretation of its own regulatory standards encompasses the power to upset settled expectations that Congress has specifically sought to protect. This Court should grant the petition for certiorari to correct this misguided approach.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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